

This claim was settled by an Agreed Award on December 19, 2003. The parties had designated Dr. Phillip Mills as the authorized treating physician to provide post-award medical care for claimant's cervical spine. When Dr. Mills closed his medical practice in Wichita, the parties agreed that claimant's medical care would be provided by Dr. Paul Stein.

The claimant filed an application for post-award medical on June 26, 2007, seeking follow-up evaluation of his cervical spine with Dr. Abay. At the post-award hearing claimant requested a change of physician from Dr. Stein.

The Administrative Law Judge (ALJ) found claimant was not satisfied with Dr. Stein who agreed claimant needed a different doctor to provide long-term care and medications. Consequently, the ALJ authorized Dr. Pastor Causin, a physiatrist and pain specialist, to provide claimant's long-term care and medication treatment. The ALJ further found claimant's attorney was entitled to \$150 an hour for 12.5 hours or \$1,875 in attorney fees.

Respondent requests review of whether the ALJ erred in appointing Dr. Causin as claimant's authorized treating physician. Respondent argues the ALJ did not have authority to order any medical treatment beyond the claimant's specific request that Dr. Abay be authorized. Respondent further argues claimant failed to meet his burden of proof to establish the Dr. Stein's care was unsatisfactory. Respondent also argues that Dr. Sandra Barrett has been authorized to provide claimant's long-term medication management.

Claimant argues that each time he tried to schedule an appointment with Dr. Stein he was first required to get approval from the insurance carrier which frequently delayed matters for up to a month. And sometimes approval was not granted which required claimant to scheduled hearings in order to obtain approval to see the authorized physician. Dr. Stein agreed that claimant's long-term care should be monitored by a different physician. Claimant requests the Board to affirm the ALJ's Post-Medical Award.

The issue for Board determination is whether the ALJ erred by ordering a change of authorized treating physician for claimant and designating a specific doctor rather than giving respondent the opportunity to provide claimant a list of three physicians.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

A chronology of events is helpful. On December 19, 2003, claimant settled his neck injury claim (4/18/01 date of accident) by an Agreed Award and reserved his rights to future medical as well as review and modification. On March 12, 2004, claimant's attorney filed an application for post award medical. On April 15, 2004, a hearing was held and the ALJ appointed Dr. Philip Mills as claimant's authorized treating physician for all treatment, tests and referrals regarding claimant's neck pain.

On October 5, 2005, claimant's attorney filed an application for post award medical because the authorized treating physician, Dr. Mills, had closed his practice and left Wichita, Kansas. On December 9, 2005, the parties agreed that Dr. Paul S. Stein was designated as claimant's authorized treating physician for all treatment, tests and referrals, except referrals to rehabilitation hospitals. Respondent also agreed to pay \$495 in post award attorney fees.

A post award medical application was filed on February 7, 2007. Claimant was requesting follow-up medical evaluation with Dr. Stein, the already authorized treating physician. The claimant had difficulties scheduling appointments with Dr. Stein who apparently wanted approval from the insurance carrier before he would see claimant. And when claimant called the carrier, at least on this instance, approval was denied. However, the matter was resolved prior to the hearing on this application and claimant returned to see Dr. Stein.

On March 14, 2007, claimant was seen by Dr. Stein due to his headaches and neck pain. The doctor prescribed some medication for pain and ordered cervical spine x-rays as well as an MRI to determine if the fusion had become unstable or if there had been progressive degenerative changes above the fusion. Claimant returned on April 20, 2007, for follow-up regarding the x-rays and MRI. Dr. Stein told claimant that his x-rays did not show any instability and the MRI was stable compared to his previous studies. The doctor also told claimant that he did not provide long-term care and therefore claimant would need a physician to prescribe medications for pain.

After Dr. Stein had told claimant that the only treatment option was pain medication which Dr. Stein indicated should be monitored by a different physician, the claimant later contacted Dr. Stein for a referral back to Dr. Eustaquio Abay II. On May 22, 2007, Dr. Stein returned claimant's call for a referral to Dr. Abay and although Dr. Stein had no objection with regard to claimant seeing Dr. Abay, Dr. Stein opined he would not order such a referral because it was not medically necessary. Claimant then filed another post award medical application on June 26, 2007. Claimant was requesting a follow-up evaluation of his cervical spine with Dr. Abay.

Claimant then went to see Dr. Abay on his own. Dr. Abay examined and evaluated claimant on October 4, 2007, due to neck pain and headaches. Upon examination, the doctor found claimant's exam to be normal for someone with a fusion. Dr. Abay diagnosed claimant as having a soft tissue strain to the neck or residual arthritic pain. Dr. Abay prescribed pain medication and referred claimant to another doctor for long-term care and possibly physical therapy.

On April 24, 2008, a Post-Medical Award decision was rendered by the ALJ. Judge Barnes found that claimant was dissatisfied with his authorized treating physician, Dr.

Stein. And that Dr. Stein had testified that a different doctor should provide claimant's long-term care and monitor his medications. The ALJ noted that at the conclusion of the post-award hearing the respondent had been provided the opportunity to submit a list of three physicians to claimant to provide such care but had declined. It was not until respondent's filed its brief on December 20, 2007, that it indicated that Dr. Sandra Barrett had been appointed to monitor claimant's ongoing medication and treatment needs. The ALJ concluded respondent had declined to provide a list of three physicians and had passed on several other opportunities to appoint a physician as recommended by Dr. Stein. Consequently, the ALJ ordered respondent to provide long-term care and medication treatment for claimant with Dr. Pastor Causin. The ALJ further found that claimant's attorney was entitled to \$1,875 in attorney fees from January 25, 2007, through September 6, 2007, for the post-award proceedings.

When claimant had filed his application for post-award medical he was seeking a follow-up evaluation of his cervical spine, in essence a second opinion, after Dr. Stein had concluded that nothing further, short of pain medication, could be done as his neck fusion was solid. But at the post-award hearing the claimant specifically requested designation of a physician to provide the long-term care as recommended by Dr. Stein.

The respondent argues that claimant had requested a referral to Dr. Abay but failed to establish that the medical treatment being provided by the authorized provider was unsatisfactory. Respondent argues there is no medical or factual basis for a change of physician.

As noted, the claimant initially wanted a referral to Dr. Abay but at the hearing he simply requested a physician to provide the long-term care that Dr. Stein had recommended. In Dr. Stein's progress note from his March 14, 2007 visit with claimant the doctor had noted that a physician needed to be authorized to prescribe claimant's medications in the future because Dr. Stein did not do long-term care. This recommendation was repeated in Dr. Stein's progress note from his visit with claimant on April 20, 2007. The note provided in pertinent part: "Again, a physician needs to be authorized to continue to provide his pain medication. Since I do not do long-term care, that should be a different physician and authorization should be made."<sup>1</sup> Respondent's counsel was copied on the progress notes.

Dr. Stein testified:

Q. I'm sorry, okay. Doctor, what is your current recommendation for this gentleman with respect to his condition since the last time you saw him?

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<sup>1</sup> Stein Depo., Ex. 2.

A. Well, since I haven't seen him since April 20th, my recommendations at this point would be no different than what they were at the time. Medication, reasonable medication as needed for his headache and neck discomfort and a physician available to prescribe such medication. Also, if he felt the need, the possibility of trying some injections, particularly occipital nerve blocks, to see if they would reduce the headaches.<sup>2</sup>

Although it does not appear from this record that Dr. Stein's treatment was inappropriate, nonetheless, Dr. Stein stated that claimant needed another physician to prescribe and monitor claimant's medications. In essence, the authorized physician stated he no longer would provide the claimant's required necessary medical treatment. Moreover, it is equally troubling that claimant had to jump through hoops just to see the authorized physician. An appointment with the authorized physician was denied by the insurance carrier on at least one occasion which necessitated filing an application for hearing before the appointment was approved.

After Dr. Stein recommended another physician should be appointed to prescribe and monitor claimant's medications for his long-term care the respondent took no action. At the conclusion of the post-award hearing, respondent was offered the option to provide claimant with a list of three physicians from which claimant could pick the authorized treating physician. Respondent refused. The following colloquy occurred:

THE COURT: My concern is, even after you depose Dr. Stein he's going to say the same thing, he does not want to continue to be authorized to provide long term care, that's not what he does.

MR. JONES: I know, Your Honor, but we don't have a lot of choices because that's not in the record.

THE COURT: It's true, it is not in the record, but it is going to be if we set terminal dates, and he says the same thing his record has said.

Mr. Kuhn, do you have any objection to providing a list of three for someone else to provide long term medical care?

MR. KUHN: Well, I do at this point, Your Honor, because I am not exactly sure that's what Dr. Stein is saying. I think that he is very much agreeable to being Mr. Edwards' treating physician, he just doesn't want to do long term prescription monitoring. And if that's the case we can find someone else to do that. But we

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<sup>2</sup> *Id.* at 10-11.

think he's doing a fine job of monitoring the underlying injury. That's what we need to talk to Dr. Stein about.<sup>3</sup>

But Dr. Stein's progress note regarding claimant, dated April 20, 2007, specifically stated that a physician needed to be authorized to provide claimant's pain medication and that since he (Dr. Stein) did not do long-term care, that should be a different physician and authorization should be made. A copy was sent to respondent's attorney.

In summary, as early as March 2007 and especially after April 20, 2007, it was apparent Dr. Stein would not be providing claimant's long-term care. Respondent did not designate a physician at that time nor did respondent offer to designate a physician to provide that care or even accept the ALJ's suggestion regarding a list of three physicians at the August 14, 2007, Post-Award Hearing. Dr. Stein repeated his position at his December 12, 2007 deposition but respondent still did not indicate that a physician would be designated as the doctor had recommended. But after the record had been closed, respondent belatedly noted in its submission brief to the ALJ dated December 20, 2007, (which is not evidence) that a doctor had been designated to provide the recommended long-term care.

Such brinkmanship was not condoned by the ALJ who designated a treating physician. The ALJ's Post-Medical Award provided in pertinent part:

As respondent has declined on more than one occasion to provide a list of three medical providers to claimant, the court will designate a treating physician. The court will appoint Dr. Pastor Causin, a physiatrist and pain specialist, as the authorized treating physician to provide long-term care and medication treatment for claimant. Any change to Dr. Causin's authorization must be approved by the court.<sup>4</sup>

The respondent certainly did not facilitate prompt medical treatment for claimant with the authorized physician. Respondent was aware for months that the authorized doctor recommended that another physician be appointed to provide long-term care and medications for the claimant and yet respondent did not make such an appointment. It was not until after the record closed that respondent alleged it had finally followed Dr. Stein's recommendation but such alleged referral is not part of the evidentiary record.

Based upon the entire evidentiary record the Board agrees with the ALJ's determination that respondent had failed to provide medical treatment and to appoint a

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<sup>3</sup> P.A.H. Trans. at 23-24.

<sup>4</sup> ALJ Post-Medical Award (Apr. 24, 2008) at 3.

physician for claimant's long-term care as recommended by the authorized treating physician. The Board affirms the ALJ's Post-Medical Award.

**AWARD**

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated April 24, 2008, is affirmed.

**IT IS SO ORDERED.**

Dated this 30th day of June 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Donald R. Edwards, 9908 E. Kinkaid, Wichita, KS 67207  
Stephen J. Jones, Attorney for Claimant  
Eric K. Kuhn, Attorney for Respondent and its Insurance Carrier  
Nelsonna Potts Barnes, Administrative Law Judge